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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUSTIN G. PROCK, Plaintiff and Appellant, v. TAMURA CORPORATION OF AMERICA, Defendant and Respondent.	E054185 (Super.Ct.No. RIC524255) OPINION

APPEAL from the Superior Court of Riverside County. Paulette Durand-Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Walters & Caietti and Robert M. Caietti for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith and Kevin M. Erwin for Defendant and Respondent.

Plaintiff and appellant Justin Prock appeals a judgment entered after the trial court granted Tamura Corporation of America's (hereafter Tamura) motion for summary

judgment. We conclude that Tamura failed to make a prima facie showing that Prock could not prevail. Accordingly, we will reverse the judgment.

PROCEDURAL HISTORY

On April 20, 2009, Prock filed a complaint against Tamura, alleging wrongful termination in violation of the public policy prohibiting disability discrimination; failure to make a reasonable accommodation for his disability, in violation of Government Code section 12940, subdivision (m); and failure to engage in an interactive process to determine an effective reasonable accommodation for his disability, in violation of Government Code section 12940, subdivision (n).[1]

Tamura filed its answer and a motion for summary judgment or summary adjudication of issues. The motion for summary judgment was granted, and judgment was entered for Tamura. Prock filed a timely notice of appeal.

FACTS

In his complaint, Prock alleged that he was employed by Tamura and that Tamura is an employer subject to the Fair Housing and Employment Act (FEHA). (§ 12940 et seq.) He alleged that in July 2008, he began suffering from "anxiety related symptoms" which worsened over time. On August 20, 2008, his doctor prescribed medication and ordered him to take a leave from work though September 5, 2008. Prock's doctor later advised him to remain off work until September 19, 2008. Tamura "was notified" and

[1] All statutory citations refer to the Government Code unless another code is specified.

was provided with documentation from Prock's doctor that Prock would need leave from work through September 19, 2008.

On September 15, 2008, Prock's manager, Ongela Starks, emailed Prock to confirm that he would be returning to work on September 22, which was the first work day following September 19. Prock informed her by email on September 17 that he was having "issues" with his medication and had an appointment with his doctor on September 22. He told her that he would advise her of his doctor's recommendations after the appointment.

On September 22, Starks emailed Prock, stating that she had expected him back to work that day. She asked if his doctor had extended his medical leave and asked to have the doctor's office fax her a note if that was the case. Otherwise, she informed him, his absence that day would be considered unexcused. She asked him to contact her immediately and let her know what time he would be coming to work the following day.

Prock called Starks and informed her that his doctor was extending his leave until October 31, 2008. The documentation was provided to Starks. Starks put Prock on hold and then resumed the call with Barbara Shoop, Prock's supervisor, on speaker phone. During that conversation, Prock was told that Tamura could not hold his position open until October 31, 2008, and that he was being terminated.

Prock filed a complaint with the Department of Fair Employment and Housing and later received a "right to sue" letter from the department.

LEGAL ANALYSIS

TAMURA DID NOT MEET ITS BURDEN IN MOVING FOR SUMMARY JUDGMENT

Standard of Review

A motion for summary judgment will be granted if the submitted papers show that "there is no triable issue as to any material fact," and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets its burden of showing that a cause of action has no merit if it shows that one or more of the elements of the cause of action cannot be established, or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850, fn. omitted.)

We review the record and the determination of the trial court de novo. (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003.) "'[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.'" (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 235.)

Tamura's Motion Failed to Establish That Prock Was Not a "Qualified Individual" Under the FEHA.

Under the FEHA, an employer may not discharge an employee because of the employee's mental or medical condition unless the employee is unable to perform the essential functions of his or her job "even with reasonable accommodations." (§ 12940, subd. (a)(1), (2).) It is an unlawful practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability" of the employee, unless the employer can demonstrate that doing so would "produce undue hardship to its operation." (§ 12940, subd. (m).) Further, an employer must engage in a "timely, good faith, interactive process" to determine "effective, reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (§ 12940, subd. (n).)

The employee's status as a "qualified individual with a disability," i.e., one who is able to perform the essential functions of his or her job, either with or without reasonable accommodation, is an element of the plaintiff's prima facie claim for discrimination or failure to provide a reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 260-264.)

Tamura contends, as it did below, that it was entitled to summary judgment because the undisputed fact that Prock was totally disabled while he was on leave of absence precluded Prock from meeting his burden of proving that he is a qualified individual. This contention applied to all three causes of action. The trial court agreed

with Tamura, holding that because it was undisputed that Prock was completely disabled and could not perform any of his job functions during the period he was on medical leave and at the time his employment was terminated, the burden shifted to Prock to provide an explanation of the "apparent discrepancy" between his claim that he was fired in violation of the FEHA and the fact that he was completely disabled. The court found that Prock had not met that burden.

Tamura's contentions are based on the faulty premise that an employee who needs a leave of absence from work is not capable of performing his or her job and is therefore by definition not a qualified individual under the FEHA, and on the equally faulty premise that a plaintiff who has received disability benefits is necessarily judicially estopped from asserting that he or she is a qualified individual under the FEHA.

Contrary to Tamura's contentions, it is well established that an employee who is temporarily disabled and who needs a leave of absence to recover from the disabling condition may nevertheless be a qualified individual: A "reasonable accommodation can include providing the employee accrued paid leave or additional unpaid leave for treatment . . . provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." (*Hanson v. Lucky Stores, Inc*. (1999) 74 Cal.App.4th 215, 226; accord, *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193-1194.)

However, if there appears to be a conflict between the employee's claim that he or she is a qualified individual and his or her representations in applying for disability income that he or she is totally disabled, the employee may be required to explain the

apparent conflict in order to avoid summary judgment on the basis of judicial estoppel, as the trial court held. In *Cleveland v. Policy Mgmt. Systems* (1999) 526 U.S. 795 (*Cleveland*), a case arising under the federal Americans With Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), the plaintiff applied for and received Social Security Disability Insurance (SSDI) benefits, representing that she was completely disabled. (*Cleveland*, at pp. 798, 802.) She also sued her former employer alleging that it had terminated her employment without reasonably accommodating her disability in violation of the ADA. (*Cleveland*, at pp. 798–799.) Her former employer moved for summary judgment, and the district court granted the motion "because, in that court's view, [plaintiff], by applying for and receiving SSDI benefits, had conceded that she was totally disabled" and she was estopped "from proving an essential element of her ADA claim, namely that she could 'perform the essential functions' of her job, at least with 'reasonable accommodation.'" (*Id*. at p. 799.)

The United States Supreme Court analyzed the requirements for receipt of SSDI benefits and concluded that an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with the plaintiff's statements to the Social Security Administration (SSA) that she could not perform her own job. (*Cleveland*, *supra*, 526 U.S. at pp. 801-805.) The Supreme Court explained that, "despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here. That is because there are

too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." (*Id*. at pp. 802–803.) The court further explained that "[a]n SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely 'I am disabled for purposes of the Social Security Act.'" (*Id*. at p. 802.) The court held, however, that judicial estoppel may be a basis for summary judgment on an ADA claim if the plaintiff fails to proffer a sufficient explanation to resolve the apparent conflict or at least establish the existence of a triable issue of fact. (*Id*. at pp. 806-807.) "To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'" (*Id.* at p. 807.)

Applying California law as it pertains to judicial estoppel, California courts have reached similar conclusions, i.e., that judicial estoppel does not automatically apply where a plaintiff claims both to be a qualified individual under the ADA or the FEHA and to be disabled for purposes of receiving disability benefits or workers' compensation benefits. At most, on summary judgment, the burden shifts to the plaintiff to explain the apparent conflict. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178-192; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 957-964.)

Here, there is no conflict between Prock's FEHA claim and his receipt of disability income, because Prock's FEHA claim rests on the assertion that he was

temporarily totally disabled and needed, as a reasonable accommodation, a further leave of absence in order to adjust to his medication and to be able to resume work. Consequently, the burden did not shift to Prock to provide an explanation of any apparent conflict.

For these reasons, Tamura is not entitled to judgment on any of the three causes of action either on the ground that Prock is not a qualified individual for purposes of the FEHA as a matter of law because he admits that he was totally disabled, or on the ground that Prock was required to explain an apparent conflict between his claim under the FEHA and his disability claim but failed to do so.

There Is a Triable Issue of Material Fact as to Whether Tamura Offered Prock a Reasonable Accommodation and Whether It Failed to Engage in a Good Faith Interactive Process Before Dismissing Prock.

As we stated above, under the FEHA, an employer must "make reasonable accommodation for the known physical or mental disability" of the employee, unless the employer can demonstrate that doing so would "produce undue hardship to its operation." (§ 12940, subd. (m).) Further, an employer must engage in a "timely, good faith, interactive process" to determine "effective, reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (§ 12940, subd. (n).) Although failure to accommodate a disability and failure to engage in an interactive process to determine whether a reasonable accommodation can be made each give rise to

an independent cause of action under the FEHA (see *Wilson v. County of Orange*, *supra*, 169 Cal.App.4th at p. 1193), the two are often inextricably linked. (See *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1019; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 257-267.) That is the case here.

Here, it is undisputed that Tamura initially offered a reasonable accommodation when it became aware that Prock claimed a medical disability and provided Tamura with his doctor's recommendation for a leave of absence. However, it is also undisputed that Tamura summarily dismissed Prock when Prock requested a further extension of his leave. Tamura contends, as it did below, that by affording Prock a leave of absence, which it extended twice, it did provide Prock a reasonable accommodation as a matter of law, because (1) Prock never provided Tamura with a statement from his doctor as to the nature of Prock's stress-related disability; (2) Prock never provided Tamura with a prognosis as to when he would be able to return to work; and (3) Prock never provided Tamura with any assurance that he would be able to perform the essential duties of his job at the end of any leave of absence. However, those issues are nothing more than the questions that Tamura should have been asking Prock as part of the interactive process.

Although an FEHA claimant has the duty to inform the employer that he or she has a disability and needs accommodation, no "magic words" are needed to invoke the employer's obligation to engage in the interactive process. (*Scotch v. Art Institute of California*, *supra*, 173 Cal.App.4th at p. 1013.) Rather, the obligation to engage in an interactive process of seeking to determine an appropriate accommodation, if any can be

made, arises when the employer becomes aware of the need to consider an accommodation. (*Ibid*.) And, "[o]nce the interactive process is initiated, the employer's obligation to engage in the process in good faith is continuous. '[It] extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the [FEHA], by encouraging employers to seek to find accommodations that really work . . . .' [Citation.] [¶] Both employer and employee have the obligation 'to keep communications open' and neither has 'a right to obstruct the process.' [Citation.] 'Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith.' [Citation.]" (*Id*. at pp. 1013-1014.)

Thus, while Tamura is correct that a plaintiff claiming that the employer was required to grant a leave of absence as a reasonable accommodation has the burden of proving that a "finite" leave of absence would result in the employee being able to return to work and to perform the essential functions of his or her job, with or without any other reasonable accommodation, and that an employer is not required to provide an open-ended leave with no assurance as to when the employee will be able to return to work

(*Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 226; *Wilson v. County of Orange, supra*, 169 Cal.App.4th at pp. 1193-1194), that does not mean that Prock's failure to volunteer that information necessarily absolves Tamura of the duty to participate in the interactive process and to request whatever information it required in order to determine whether an extension of the leave of absence was warranted. (*Scotch v. Art Institute of California, supra*, 173 Cal.App.4th at pp. 1013-1014.)

Accordingly, there are triable issues of fact as to whether by granting Prock leave only through September 19, 2008, Tamura provided a reasonable accommodation and whether Tamura breached its obligations under the FEHA by failing to engage in a good faith interactive process to ascertain the probable date of Prock's return to work and to determine whether further accommodation was required under the FEHA.

DISPOSITION

The judgment is reversed, and the cause is remanded for further proceedings.

Plaintiff Justin Prock is awarded costs on appeal.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.